STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2001
v	No. 215369 Wayne Circuit Court
AARON FULTON ANTHONY, Defendant-Appellant.	LC No. 96-503221

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted from his conviction by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant to 50 to 75 years in prison. We affirm.

Defendant first argues that the trial court erred by failing to give a requested instruction regarding identification. We disagree. This Court reviews claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). As this Court stated in *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997), jury instructions are to be viewed as a whole rather than extracted piecemeal to establish error. As long as the instructions fairly presented the issues to the jury and protected the defendant's rights, imperfections do not constitute error. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

At trial, both parties presented proposed jury instructions to the court. Defendant proposed a modified version of CJI2d 7.8, which addresses identification. Defendant has not provided evidence of the specific instruction requested, but it appears from the record that defendant proposed a modification to paragraph 5 of CJI2d 7.8, which provides:

> You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

Evidently, defendant proposed adding the following sentence to the end of paragraph 5:

> Alternatively, you may use such lack of identification testimony alone as a basis to acquit the Defendant, if you fund [sic] that the lack of credible identification testimony creates a reasonable doubt in your mind that the Defendant was the person who committed the crime.

The court denied defendant's request to have the modified instruction read to the jury.

Defendant's proposed addition to paragraph 5 of CJI2d 7.8 was merely a restatement of paragraph 1 of CJI2d 7.8, which provides:

> One of the issues in this case is the identification of the defendant as the person who committed this crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.

Defendant's proposed instruction stated that the jurors should acquit defendant if they found that "the lack of credible identification testimony create[ed] a reasonable doubt in [their] mind[s] that [defendant] was the person who committed the crime." The plain language of paragraph 1 of CJI2d 7.8 makes it clear that a defendant should be acquitted if the prosecution fails to present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime. Therefore, defendant's proposed addition to paragraph 5 of CJI2d 7.8 was unnecessary because its substance was covered by paragraph 1 of CJI2d 7.8, and the trial court's failure to allow the proposed addition thus does not require reversal. See, e.g., *Piper, supra* at 648, and *Holt, supra* at 116.

After the trial court declined to allow defendant's proposed modified jury instruction on identification, defendant requested, in the alternative, that the trial court give only paragraph 1 of CJI2d 7.8. The trial court denied this request and proceeded to ask whether defendant wanted (1) all of CJI2d 7.8 read to the jury, or (2) none of CJI2d 7.8 read to the jury. Defendant declined to answer this question directly, but stated that "the standard instruction on identification [was] not appropriate" to the case. Subsequently, the trial court ruled that no identification instruction would be given because (1) neither party wanted all of CJI2d 7.8 read to the jury, and (2) no witness had identified defendant as the perpetrator, thus making an identification instruction unnecessary.

Defendant suggests on appeal that the trial court should have allowed only paragraph 1 of CJI2d 7.8 to be read to the jury. We disagree. Again, no error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. See *People v Messenger,* 221 Mich App 171, 177-178; 561 NW2d 463 (1997). As explained above, paragraph 1 of CJI2d 7.8 contains a statement of the prosecutor's burden of proof on the issue of identity. The trial court's instructions to the jury in the present case contained a clear explanation of the prosecutor's burden of proof regarding identity, disregarding the omission of paragraph 1 of CJI2d 7.8. Indeed, the court stated the following:

> The evidence must convince you beyond a reasonable doubt that the crime occurred September 3rd, 1996 within Wayne County.
>
> * * *
>
> The Defendant is charged with the crime of assault with intent to murder. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant tried to physically injury [sic] another person. Second, that when the Defendant committed the assault, he had the ability to cause an injury or at least believed he had the ability to cause an injury. Third, that the Defendant intended to kill the person he assaulted.

Because the trial court gave essentially the same information to the jury during a different part of the jury instructions, the trial court did not err by denying defendant's request that the first paragraph of CJI2d 7.8 be read to the jury. See *Messenger, supra* at 177-178.

Defendant additionally suggests that the trial court should have read a modified version of paragraph 4 of CJI2d 7.8, which states as follows:

> You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his/her) identification of the defendant during trial.

We find no basis for reversal with regard to this argument. First, the issue is unpreserved because defendant failed to request a modified version of paragraph 4 below. Second, paragraph 4, as written, was inapplicable to the instant case because no witness identified defendant as the perpetrator, and defendant does not indicate on appeal how the instruction should have been modified to make it applicable.

Next, defendant argues that the trial court erred by denying his request that CJI2d 7.4 be read to the jury as a result of the testimony given by Michelle Stone. Again, we disagree. CJI2d 7.4 states as follows:

> (1) You have heard evidence that the defendant could not have committed the alleged crime because [he/she] was somewhere else when the crime was committed.
>
> (2) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove [he/she] was somewhere else.
>
> (3) If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find [him/her] not guilty.

We conclude that defendant was not entitled to this instruction, for two combined reasons. First, Stone's testimony did not fit the definition of alibi testimony set forth in *People v Gillman,* 66

Mich App 419, 424; 239 NW2d 396 (1976), which stated that alibi testimony is "testimony which is offered in order to prove that the defendant was somewhere else than at the scene of the crime when the crime occurred." Stone's testimony was not offered to prove that defendant was somewhere other than the crime scene at the time of the crime. Stone was listed only on the prosecution's witness list and was called by the prosecution at trial. Clearly, the prosecution did not call Stone as a witness in order to prove that defendant was somewhere other than the crime scene when the crime occurred.

Second, in order to be considered alibi testimony, the testimony must, at a minimum, "raise a reasonable doubt of defendant's presence at the time and place of the commission of the crime charged." *People v Lee*, 391 Mich 618, 641; 218 NW2d 655 (1974). Stone's testimony could not have raised a reasonable doubt regarding defendant's presence at the crime scene at the time the crime was committed (the testimony of various witnesses indicated that the crime occurred between 6:00 and 6:15 p.m.). Although Stone initially testified that she picked up defendant at a grocery store (according to various witnesses, located one-half to three miles from the crime scene), at approximately 5:30 p.m. on the date in question and took him to her mother-in-law's house, she later testified that she was sure that she picked defendant up sometime between 6:00 and 6:30 p.m. Ultimately, Stone testified that she was not wearing a watch that day and that she was "guesstimating" about the times that events occurred. Moreover, Stone testified that when she picked defendant up from the grocery store, he seemed upset, his pants were wet (the assault took place near a creek), and he told her that "[h]e had got into a fight with some guys on I-75, and two guys started chasing him and throwing things at him and he started running through the woods, and he said the cops were after him." The totality of Stone's testimony simply did not raise a reasonable doubt regarding whether defendant was at a different location at the time the crime occurred. Instead, it supported the prosecution's theory of the case that defendant committed the crime and then ran to the grocery store and called Stone to pick him up. Accordingly, defendant was not entitled to the alibi jury instruction, and the trial court did not err in denying defendant's request.

Moreover, even assuming, arguendo, that the trial court erred in refusing to give the requested alibi instruction, the evidence of defendant's guilt (see *infra*) was sufficiently strong such that the failure to give the instruction was harmless. See *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994) (indicating that faulty jury instructions are subject to harmless-error analysis).

Next, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to show the jury defendant's tattoos. To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that counsel's error or errors reasonably affected the outcome of the proceedings. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Christopher Muha, who claimed to have witnessed the assault, testified during cross-examination by defense counsel that the man he saw assaulting the victim wore a white tee shirt or tank top, that he could see "all the man's arms," and that he did not see any tattoos on the man's arms. In an affidavit in support of his motion for a new trial or an evidentiary hearing,

defendant indicated that he had a tattoo on the bicep of his right arm, approximately four inches long and two-and-one-half inches wide, and a tattoo from his left shoulder blade to his left elbow. On appeal, defendant claims that his attorney rendered ineffective assistance by failing to show the jury that he had tattoos on both arms and that reversal is warranted. We disagree.

Indeed, defendant cannot show that but for counsel's alleged error, he would have been acquitted. See *id.* It was established at trial that Muha could not identify defendant as the person he saw committing the assault on September 3, 1996. On cross-examination, Muha testified that he told the police that if he "saw the man that did this again [he] would be able to identify him." At no time did Muha identify defendant as the perpetrator, either before or during trial. During his closing argument, defense counsel pointed out Muha's failure to identify defendant as the perpetrator, and the prosecutor did not argue that Muha's description of the perpetrator supported defendant's conviction. Instead, the prosecutor presented evidence that defendant confessed to the crime while in police custody. The prosecutor also presented evidence that defendant's fingerprints were found on a brown paper bag that was found near the crime scene, as well as evidence that fibers found on the victim's shorts, shirt, and under the victim's fingernails were consistent with the fibers taken from defendant's tee shirt. Given the weight of the remaining evidence against defendant and the fact that Muha could not identify defendant as the perpetrator, we find that defendant has failed to show a reasonable probability that if defense counsel had shown the jury defendant's tattoos, defendant would have been acquitted of assault with intent to commit murder. Accordingly, reversal on the basis of ineffective assistance of counsel is unwarranted. *Id*.

Finally, defendant argues that his fifty-year minimum sentence violated the rule of proportionality. We disagree. Provided permissible factors are considered, appellate review of a defendant's sentence is limited to whether the sentencing court abused its discretion. See *People v Hansford (After Remand),* 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v St John,* 230 Mich App 644, 649; 585 NW2d 849 (1998). A sentence that departs from the sentencing guidelines is subject to careful scrutiny on appeal.[1] *People v Cain,* 238 Mich App 95, 132; 605 NW2d 28 (1999). However, the "key test" of proportionality is "not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter." *Id.*, quoting *People v Houston,* 448 Mich 312, 320; 532 NW2d 508 (1995). The sentence in the present case clearly reflects the seriousness of the matter. The victim in this case was an eight-year-old girl. On the date of the assault, the victim approached defendant and began talking to him about her new bicycle. Defendant told the victim to meet him "at the creek." When the victim went to the area near the creek, defendant proceeded to beat her head against a tree and choke her. The evidence shows that defendant then left the victim lying face down in the dirt and fled the area. Given the extremely egregious circumstances of this crime, we find

[1] Here, the guidelines produced a sentence range of 180 months to 300 months "or Life." Under *People v Harris*, 190 Mich App 652, 665-666; 476 NW2d 767 (1991), the fifty-year minimum imposed constituted a departure from the guidelines.

that the trial court did not abuse its discretion by departing from the guidelines and sentencing defendant to a minimum prison term of fifty years.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter